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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY J. DeCINTIO, PETER A. PIAZZA, MICHAEL A. GARAYUA, JOSE P. GOMES, ANGEL A. GARAYUA, WINSTON P. DAVID, DANIEL A. SAMUELS,

Petitioners,

— vs. —

WESTCHESTER COUNTY MEDICAL CENTER; COUNTY OF WESTCHESTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Do the male petitioners state a claim that their employer violated the Equal Pay Act by paying a female co-employee more for equal work under similar working conditions, requiring equal skill, effort, and responsibility, when the district court found the employer's motivation was the existence of a sexual relationship between the female employee and her male supervisor?

2. Do the male petitioners state a claim that their employer violated Title VII of the Civil Rights Act of 1964 by preferentially hiring a woman, when the district court found she was hired because of her sexual relationship with a male supervisor, who excluded the otherwise qualified male petitioners from consideration for a pretextual reason?

LIST OF PARTIES

The caption names all the parties to the proceeding in the United States Court of Appeals for the Second Circuit, whose judgment is here sought to be reviewed.

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CITATIONS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which is here sought to be reviewed, is published at 807 F.2d 304 (1986) and at 42 F.E.P. Cas. 921 (1986). The Court of Appeals' memorandum decision denying rehearing and suggestion for rehearing in banc is unpublished and is reproduced in Appendix C.

The opinion of the United States District Court for the Southern District of New York is unpublished. A copy of the transcript of the oral opinion, delivered May 27, 1986, is reproduced in Appendix B.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered December 15, 1986, and plaintiffs-appellees' petition for rehearing was denied March 9, 1987.

Jurisdiction to review the judgment below by writ of certiorari is conferred upon this Court by 28 U.S.C. §1254(a).

TEXT OF RELEVANT AUTHORITIES

A. Equal Pay Act, 29 U.S.C. § 206(d)(1)

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an

employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

B. Title VII of Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)

(a) Employers. It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

employee, because of such individual's race, color, religion, sex, or national origin.

C. Equal Employment Opportunity Commission Guidelines, 29 C.F.R. Part 1604.11 (1986)

Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended: Adoption of Final Interpretive Guidelines

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Amendment to Guidelines on Discrimination Because of Sex.

SUMMARY: On April 11, 1980, the Equal Employment Opportunity Commission published the Interim Guidelines on sexual harassment as an amendment to the Guidelines on Discrimination Because of Sex, 29 CFR Part 1604.11, 45 FR 25024. This amendment will re-affirm that sexual harassment is an unlawful employment practice. The EEOC received public comments for 60 days subsequent to the date of publication of the Interim Guidelines. As a result of the comments

and the analysis of them, these Final Guidelines were drafted.

EFFECTIVE DATE: November 10, 1980.

FOR FURTHER INFORMATION CONTACT: Karen Danart, Acting Director, Office of Policy Implementation, Equal Employment Opportunity Commission, 2401 E Street, NW., Washington, D.C. 20506, (202) 634-7060.

SUPPLEMENTARY INFORMATION: During the 60-day public comment period which ended on June 10, 1980, the Commission received over 160 letters regarding the Guidelines on sexual harassment. These comments came from all sectors of the public, including employers, private individuals, women's groups, and local, state, and federal government agencies.

The greatest number of comments, including many from employers, were those commending the Commission for publishing guidelines on the issue of

sexual harassment, as well as for the content of the guidelines.

The second highest number of comments specifically referred to §1604.11(c) which defines employer liability with respect to acts of supervisors and agents. Many commentors, especially employers, expressed the view that the liability of employers under this section is too broad and unsupported by case law. However, the strict liability imposed in §1604.11(c) is in keeping with the general standard of employer liability with respect to agents and supervisory employees. Similarly, the Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor. Anderson v. Methodist Evangelical Hospital, Inc., ___ F. Supp. ___, 3 EPD ¶8282 (D.C. Ky.

1971), aff'd 464 F.2d 723, 4 EPD ¶7901 (6th Cir. 1972); Commission Decision No. ¶71-969, CCH EEOC Decisions (1973) ¶6193; Commission Decision No. 71-1442, CCH EEOC Decisions (1973) ¶6216. Furthermore, a recent 9th Circuit case on sexual harassment imposed strict liability on the employer where a supervisor harassed an employee without the knowledge of the employer. Miller v. Bank of America, 600 F.2d 211, 20 EPD ¶ 30,086 (9th Cir. 1979). In keeping with this standard, the Commission, after full consideration of the comments and the accompanying concerns, will let §1604.11(c) stand as it is now worded.

A number of people asked the Commission to clarify the use of the term "agent" in §1604.11(c). "Agent" is used in the same way here as it is used in § 701(b) of Title VII where "agent"

is included in the definition of "employer."

A large number of comments referred to §1604.11(a) in which the Commission defines sexual harassment. These comments generally suggested that the section is too vague and needs more clarification. More specifically, the comments referred to subsection (3) of § 1604.11(a) as presenting the most troublesome definition of what constitutes sexual harassment. The Commission has considered these comments and has decided that subsection (3) is a necessary part of the definition of sexual harassment. The courts have found sexual harassment both in cases where there is concrete economic detriment to the plaintiff, Heelan v. Johns-Manville Corp., 451 F.Supp. 1382, 16 EPD ¶8330 (D. Colo. 1978), Barnes v. Costle, 561 F.2d 983, 14 EPD ¶7755 (D.C. Cir.

1977), Garber v. Saxon Business Products, 552 F.2d 1032, 14 EPD ¶7587 (4th Cir. 1977), and where unlawful conduct results in creating an unproductive or an offensive working atmosphere. Kyriazi v. Western Electric Co., 461 F.Supp. 894, 18 EPD ¶8700 (D.N.J. 1978). For analogous cases with respect to racial harassment see Rogers v. EEOC, 454 F.2d 234, 4 EPD ¶7597 (5th Cir. 1971); EEOC v. Murphy Motor Freight Lines, Inc., 488 F.Supp. 381, 22 EPD ¶30,888 (D.C. Mn. 1980).

The word "substantially" in §1604.11(a)(3) has been changed to "unreasonably." Many commentors raised questions as to the meaning of the word "substantially." The word "unreasonably" more accurately states the intent of the Commission and was therefore substituted to clarify that intent.

It should be emphasized that the appropriate course for further clarification and guidance on the meaning of §604.11(a)(3) is through future Commission decisions which will deal with specific fact situations. Since sexual harassment allegations are reviewed on a case-by-case basis, any further questions will be answered through Commission decisions which will be fact specific.

A fair number of comments were received on §1604.11(d) which defined employer liability with respect to acts of persons other than supervisors or agents. Again, as in §1604.11(c), the traditional Title VII concept prevails regarding employer liability with respect to those people other than agents and supervisory employees. Many commentors asked the Commission to clarify the meaning of "others." As a

result, §1604.11(d) has been separated into two subsections. The new §1604.11(d) refers to sexual harassment among fellow employees and the liability of an employer in such a situation.

The new §1604.11(e) refers to the possible liability of employers for acts of non-employees towards employees. Such liability will be determined on a case-by-case basis, taking all facts into consideration, including whether the employer knew or should have known of the conduct, the extent of the employer's control and other legal responsibility with respect to such individuals.

A number of people also raised the question of what an "appropriate action" might be under §1604.11(d). What is considered to be "appropriate" will be seen in the context of specific cases through Commission decisions.

Section 1604.11(e) of the Interim Guidelines, which sets out suggestions for programs to be developed by employers to prevent sexual harassment, now becomes §1604.11(f). The Commission has received many comments which state that this section is not specific enough. The Commission has decided that the provisions of this section should illustrate several kinds of action which might be appropriate, depending on the employer's circumstances. The emphasis is on preventing sexual harassment, and §1604.11(f) intends only to offer illustrative suggestions with respect to possible components of a prevention program. Since each workplace requires its own individualized program to prevent sexual harassment, the specific steps to be included in the program should be developed by each employer.

Several commentors raised the question of whether a third party who was denied an employment benefit would have a charge cognizable under Title VII where the benefit was received by a person who was granting sexual favors to their mutual supervisor. Even though the Commission does not consider this to be an issue of sexual harassment in the strict sense, the Commission does recognize it as a related issue which would be governed by general Title VII principles. Subsection (g) has been added to recognize this as a Title VII issue.

After carefully considering the numerous comments it received, the EEOC made the above changes to the Interim Guidelines and, at its meeting of September 23, 1980, adopted them as the Final Guidelines on sexual harassment, subject to formal interagency coordina-

tion. Formal interagency coordination has been completed, and none of the affected agencies had additional comments. Therefore, these Guidelines become final as adopted at the Commission meeting of September 23, 1980.

Signed at Washington, D.C., this 3rd day of November 1980.

Eleanor Holmes Norton,
Chair, Equal Employment Opportunity Commission.

Accordingly, 29 CFR Chapter XIV, Part 1604 is amended by adding §1604.11 to read as follows:

PART 1604 -- GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

§1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.[1] Unwelcome sexual advances, requests for

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1. The principles involved here continue to apply to race, color, religion or national origin.

sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The

determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job junctions [sic] performed by the individual in determining whether an individual acts in either

a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have

with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but

denied that employment opportunity or benefit.

(Title VII, Pub. L. 88-352, 78 Stat. 253 (42 U.S.C. 2000e et seq.)).

STATEMENT OF THE CASE

Petitioners are seven male respiratory therapists employed or formerly employed by respondent Westchester County at its health care facility, the Westchester County Medical Center. The complaint alleges violations of the Equal Pay Act, 29 U.S.C. §206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2.

Petitioners claimed that they were disqualified from promotion to Assistant Chief Respiratory Therapist assigned to the Neonatal Intensive Care Unit ("NICU") on the basis of sex, in violation of Title VII. Specifically, they alleged that their department head, James Ryan, added a new "special requirement," registration by the National Board of Respiratory Therapists ("NBRT"), to the job specifications in

order to disqualify the otherwise qualified petitioners and thereby permit him to hire Jean Guagenti, a woman who had once worked there and with whom he enjoyed a sexual relationship. She had the special requirement; petitioners did not. The Equal Pay Act claim stated that, as Assistant Chief, Guagenti received a higher salary for performing the same work petitioners did.

After a bench trial, the United States District Court for the Southern District of New York found that the "special requirement" of NBRT registration was unrelated to the needs of the NICU, and that (aside from lacking NBRT registration) petitioners were qualified for the job and should have had preference under the applicable collective bargaining agreement. Indeed, when Guagenti was off duty and also after she

was removed from the NICU, petitioners did her job. Even after Guagenti left the NICU and returned to non-NICU respiratory therapist duties, however, she kept the Assistant Chief title and salary.

The District Court found that Ryan had made both the decision to adopt the special requirement and the decision to hire Guagenti and that Guagenti was sexually involved with Ryan when he hired her. It also found that Guagenti's and petitioners' work was equal, required equal skill, effort, and responsibility, and was performed under similar working conditions. The District Court, citing King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985), held that respondents had violated Title VII and the Equal Pay Act.

The Court of Appeals, 807 F.2d 304 (2d Cir. 1986), reversed as to both claims. It held that respondents' favoritism of Guagenti arising from the sexual relationship did not violate Title VII because it was not based upon "sex" within the meaning of Title VII. The court further held that such favoritism did not violate the Equal Pay Act, again because respondents' salary decisions were not based upon "sex" as the term is used in that statute. Petitioners' petition for rehearing was denied March 9, 1987.

ARGUMENT

POINT I. THE COURT OF APPEALS ERRONEOUSLY APPLIED TITLE VII ANALYSIS TO THE EQUAL PAY ACT

The Equal Pay Act, 29 U.S.C.§206(d), as this Court has recognized, was intended to reach all situations in which an employer paid men and women

unequally for equal work, regardless of the employer's motivation. See Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974). Unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2, the Equal Pay Act is a strict liability statute if certain objective facts are provided: difference in gender, difference in pay, and equality of work. Unless the employer's reason for the pay differential is one of the four exceptions set forth in the Act, its reason is irrelevant. See Corning Glass,, 417 U.S. at 195.

The Act is straightforward. It defines the term "discriminat[ion] . . . on the basis of sex" as "paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex ...." The Court of Appeals, however,

erroneously interpreted the term as requiring that the employer consciously pay employees of one sex more than employees of the other because of their gender. The court thus injected a new element, intent, and drastically narrowed the remedial scope of the Act.

The Court of Appeals devoted the bulk of its decision to the Title VII claim and interpreted "discriminat[ion] . . . because of . . . sex" for Title VII purposes as not including discrimination because of a sexual relationship. It then disposed of the Equal Pay Act claim in one paragraph, 807 F.2d at 308, applying the same analysis:

> Again, the problem confronting appellees is the proper definition of sex discrimination .... [T]he fundamental purpose of the Act was to remedy disparities in pay arising from traditional concepts of gender . . . . We perceive no valid justification for defining "sex" for Equal Pay Act purposes in a manner incon-

> sistent with the word's meaning under Title VII.

This analysis overlooks the fact that it is unnecessary to define "sex" at all for Equal Pay Act purposes. The statute defines "discriminate on the basis of sex" by a single objective standard -- equality of pay.

It is settled law that under the Equal Pay Act, a plaintiff makes out a prima facie case simply by showing a disparity in pay between the plaintiff and one or more employees of the opposite sex. Corning Glass, 417 U.S. at 195 ("In order to make out a case under the Act, the Secretary must show that an employer pays different wages to employees of opposite sexes 'for equal work . . . .'"). If the employer cannot show that one of the four statutory exceptions applies, it is liable, regardless of whatever other reason may have

caused the pay discrepancy. Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1260 n.5 (7th Cir. 1985) ("Title VII requires a showing of discriminatory intent while the Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown"); Strecker v. Grand Forks County Social Service Board, 640 F.2d 96, 99 n.1 (8th Cir. 1980); Kouba v. Allstate Insurance Co., 523 F. Supp. 148, 156 (E.D. Cal. 1981), rev'd on other grounds, 691 F.2d 873 (9th Cir. 1982).

Respondents did not dispute the existence of a pay disparity. It was their sole contention that on the facts, Guagenti's job and those of the petitioners were not equal work on jobs the performance of which required equal skill, effort, and responsibility, performed under similar working

conditions. The district court, however, did not find respondents' evidence credible. The court found that petitioners were able to do, and did, Guagenti's work in the NICU with only minimal training, that the registration requirement was pretextual and unrelated to the actual needs of the job, and that while Guagenti worked in the neonatal unit and also after she was removed from it, her duties were substantially the same as theirs. None of these findings was disturbed on appeal. Those facts make out a prima facie case under the Equal Pay Act. Corning Glass, 417 U.S. at 195.

Moreover, again unlike Title VII analysis, once petitioners made out a prima facie case of an Equal Pay Act violation, respondents bore the burden of proving one of the four statutory

exceptions by a preponderance of the evidence, since they are affirmative defenses. County of Washington v. Gunther, 452 U.S. 161, 170 (1981); Corning Glass, 417 U.S. at 196-97; Maxwell v. City of Tucson, 35 F.E.P. Cas. 355, 357 (9th Cir. 1984). The Court of Appeals did not reach the question of whether any of the statutory exceptions applied, because it had erroneously concluded that petitioners could not prevail simply by showing the disparity between their pay and Jean Guagenti's.

Respondents' argument that the jobs had different requirements and that Guagenti had better qualifications might perhaps be viewed as alleging that the disparity was based upon "any other factor other than sex," one of the statutory defenses. The district court,

however, specifically found the additional requirement pretextual and the claimed qualifications irrelevant. These findings were not disturbed by the Court of Appeals. Consequently, respondents have no defense.

Petitioners' proof that the sexual relationship was the true reason for the pay disparity was erroneously used by the Court of Appeals as the basis for denying their Equal Pay Act claim. In actuality, that proof merely confirmed the contention that any "factor[s] other than sex" alleged by respondents were pretexts. Had petitioners not proven the existence of the relationship, the stated ground for reversal would not exist. Thus, the Court of Appeals in effect recognized a new defense to Equal Pay Act claims -- "voluntary romantic relationship." This defense is not

supported by the Act, because an intimate relationship cannot qualify as a "factor other than sex" legitimizing the pay disparity. As the United States Court of Appeals for the Ninth Circuit has noted,

> The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason.

Kouba v. Allstate Insurance Co., 691 F.2d at 876, citing Corning Glass, 417 U.S. at 205. See Note: Not Just Any 'Factor Other than Sex': An Analysis of the Fourth Affirmative Defense of the Equal Pay Act, 52 George Washington L. Rev. 318 (Jan. 1984).

The Court of Appeals concluded that since the pay disparities did not arise "from traditional concepts of gender,"

petitioners had no cause of action. 807 F.2d at 308, quoting Corning Glass, 417 U.S. at 195. This conclusion is contradicted by the plain language of the Equal Pay Act and misinterprets Corning Glass, which states:

> The solution [to gender stereotyping] was quite simple in principle: to require that "equal work be rewarded by equal wages." . . .
>
> The Act's basic structure and operation are similarly straightforward. In order to make out a case under the Act, the Secretary must show that an employer pays different wages to employees of opposite sexes "for equal work the performance of which requires equal skill, effort, and responsibilities and which are performed under similar working conditions."

417 U.S. at 195.

A plaintiff need not prove that his or her lower pay was a result of the employer's gender stereotyping or gender-based discriminatory intent. To the contrary, the pay differential is

the discrimination. That is all the Act requires to make out a prima facie case.

Since all the statutory elements of an Equal Pay Act violation were made out and none of the statutory exceptions was found to exist, the violation was proved. If the Court of Appeals' decision is permitted to stand, not only will petitioners be denied their lawful claims, but the decision will serve to undermine the remedial purposes of the Equal Pay Act. Employers will be able successfully to defend claims by alleging that their violations were inadvertent or were based upon non-business-related factors not intended by Congress to constitute valid defenses. Accordingly, a writ of certiorari should be granted as to the Equal Pay Act question.

POINT II. SEXUAL FAVORITISM IN EMPLOYMENT VIOLATES TITLE VII

The Court of Appeals' decision that "Ryan's conduct, although unfair, simply did not violate Title VII," 807 F.2d at 308, conflicts both with the recent decision of this Court in Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986), and with case law in other circuits.

In Vinson, this Court recognized two types of sexual harassment, both of which violate Title VII: requests for sexual favors as a quid pro quo for tangible employment benefits, and sexual conduct which creates a hostile work environment. Id. at 2405. The instant case is a hybrid of these two types of discrimination. By reserving the desirable job for his paramour, Ryan gave a quid pro quo for her sexual favors; by denying the promotion to

petitioners because of her favors, he created a hostile working environment for them by negatively affecting their terms and conditions of employment. To hold that petitioners nevertheless are without a remedy would be to ignore the intent of Title VII, which as a remedial statute is to be broadly construed. See Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978), quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971). That petitioners, the ones harmed by the sexual conduct, have a cause of action under Title VII is no more than the logical corollary of Vinson.

Although there are few cases directly on point, all the courts which considered the question before the instant

case held that employees such as petitioners had claims within the purview of Title VII. King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985); Priest v. Rotary, 634 F. Supp. 571, 581-82 (N.D. Cal. 1986); Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983); see Kersul v. Skulls Angels Inc., 130 Misc. 2d 345, 495 N.Y.S.2d 886 (Sup. Ct. Queens Cty. 1985) (following King, Toscano, and EEOC guidelines in interpreting N.Y. Exec. L. §296).

The Court of Appeals implied that King did not specifically consider the question of whether Title VII provided a cause of action based upon a voluntary sexual relationship, since the parties had not raised that question on appeal. 807 F.2d at 307. This implication, however, misinterprets King. That opinion stated, 778 F.2d at 880:

> We note at the outset that the parties agree that Ms. King's

> allegation, based as it is on the sexual relationship between Ms. Grant and Dr. Smith, presents a cognizable cause of action under statutes prohibiting sex discrimination in employment. Appellees do not challenge the District Court's conclusion that this case is within the purview of such statutes. We agree with the District Court's conclusion and its rationale: that unlawful sex discrimination occurs whenever sex is "'for no legitimate reason a substantial factor in the discrimination.'" [King v. Palmer, 598 F. Supp. 65, 66-67 (D.D.C. 1984)] (quoting Bundy v. Jackson, 641 F.2d 934, 942-43 (D.C. Cir. 1981)). [Emphasis added.]

The conclusion that petitioners have a valid cause of action under a "hostile environment" theory is supported by, inter alia, Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). In Rogers, extensively cited with approval in Vinson, 106 S. Ct. at 2405-06, the Hispanic complainant showed that her employer created an offensive work environment by giving discriminatory service to its Hispanic

clientele. She established a violation of Title VII by proving that the employer's discriminatory conduct toward non-employees created a hostile and abusive work environment for her, even though it did not violate the clients' Title VII rights.

The Court of Appeals in the instant case stated that, because the relationship between Ryan and Guagenti was voluntary, it was not sexual harassment and could not support petitioners' Title VII action. 807 F.2d at 307-08. While a sexual relationship and employment benefits attached thereto may be welcomed by Guagenti and might bar a claim of sexual harassment by her, Vinson, 106 S. Ct. at 2406, the voluntariness of her participation is irrelevant to petitioners' claim. They did not welcome respondents' sexual conduct

or consent to being excluded from the promotion. That sexual conduct created a work environment that made a mockery of their contractual opportunity for advancement and higher compensation. It was no more necessary for petitioners to show that Guagenti had a sexual harassment claim of her own than it was for the plaintiff in Rogers to show that her employer's Hispanic clients had one.

The Court of Appeals inferred from the word "submission" in the applicable EEOC guideline (29 C.F.R. §1604.11(g) (1986)) that only coerced sexual relationships in the workplace can form a basis for a Title VII claim. That guideline, however, is interpreted differently by the EEOC itself. The agency found that a female employee stated a Title VII claim when her supervisor gave desirable assignments to

another female employee with whom he was sexually involved, regardless of whether her involvement was coerced. United States Postal Service, Request No. 05830088 (Appendix D hereto), at 3 (EEOC Oct. 31, 1984), aff'd, App. No. 01820227 (EEOC Oct. 8, 1982). The EEOC specifically stated:

> Moreover, in the application of Section 1604.11(g) to the facts of this case, we see no requirement that the conduct acquiesced in by the other female employee have been "unwelcome" as that term is used in Section 1604.11(a). We find that Section 1604.11(g) applies with equal force to a situation in which the acquiescence of the other female to her employer's request for sexual favors was consensual, as in this case. Section 1604.11(g) draws no distinction between "unwelcome" as opposed to consensual behavior.

Id. at 3 (footnote omitted).

When the Court of Appeals concluded that petitioners "were not prejudiced because of their status as males," 807

F.2d at 308, its finding was irrelevant to their hostile environment claim. In Rogers, the complainant's own Hispanic origin was not essential to her claim. Employees of other national origins, equally offended, could have brought the action. See Waters v. Hueblein, Inc., 547 F.2d 466 (9th Cir. 1976), cert. denied, 433 U.S. 915 (1977).

In Waters, a white plaintiff's Title VII action to redress her employer's discrimination against black co-employees was upheld. The court found the case "logically indistinguishable from Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972)," in which white as well as black tenants were permitted to sue based upon discriminatory rental policies aimed at nonwhites. See also EEOC v. Bailey, 563 F.2d 439, 452-54 (6th Cir. 1977), cert. denied,

435 U.S. 915 (1978) (EEOC could sue based upon white employee's charge of discrimination against black co-employees).

The Court of Appeals also cited the EEOC's Preamble to Interim Guidelines on Sex Discrimination, 45 Fed. Reg. 25024 (1980), to support its conclusion "that sexual relationships between co-workers should not be subject to Title VII scrutiny, so long as they are personal, social relationships." 807 F.2d at 308. Personal, noncoerced sexual relationships between supervisors and subordinates are indeed beyond Title VII scrutiny under the guidelines -- unless and until such a relationship spills over into and pollutes the work environment. As the EEOC guidelines state:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual

> favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. §1604.11(a) (1986) (footnote omitted; emphasis added). When petitioners were unfairly denied a promotion solely because of their supervisor's sexual relationship with another applicant, and were then required unfairly to perform the same job duties as she, but for less pay, the affair between Ryan and Guagenti created an intimidating, hostile, and offensive working environment that violated the EEOC guidelines and Title VII.

It is important to note that in many cases such as the one at bar, the beneficiary of the employer's sexual favoritism is unlikely to complain, even

if her submission to the sexual demands was coerced. A complaint would risk the loss of the benefits conferred upon her and possibly even her job. It is the co-employees who saw what transpired and are wronged thereby who are more likely to complain. By denying them a cause of action, the Court of Appeals would actually make coercion of individuals like Guagenti more likely. To insulate himself from liability, an employer would only need to ensure that his victim's silence was bought and paid for.

The Court of Appeals' concern that if petitioners' Title VII claim is permitted, "the EEOC and federal courts [will become involved] in the policing of intimate relationships," 807 F.2d at 308, is unfounded. The EEOC and the courts are already charged with

reviewing employment decisions based upon sexual conduct. Employers need only add to their current rules prohibiting sexual harassment that employment decisions affecting terms, conditions, or privileges of employment may not be based upon any voluntary or coerced sexual relationship of the decision maker. The fact pattern in this case is by no means unique. It has doubtless occurred many times in workplaces around the nation and is likely to recur many times more.

The decision of the Court of Appeals has attracted attention from legal and popular commentators, including the Wall Street Journal and the National Law Journal. Although public scrutiny is not per se a sufficient reason for accepting review of a case, petitioners suggest that such attention does reflect

the extraordinary importance of this issue for employers and employees.

Title VII should not be narrowly construed. This Court has stated:

> As Congress itself has indicated, a "broad approach" to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. S. Rep. No. 867, 88th Cong., 2d Sess., 12 (1964). We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.

County of Washington v. Gunther, 452 U.S. 161, 178 (1981). Neither sex nor sexual conduct nor sexual relationship, voluntary or coerced, is exempted by Title VII as a legitimate business reason for granting or denying a term, condition, or privilege of employment. Petitioners should not be deprived of a remedy.

CONCLUSION

Petitioners respectfully suggest that the Court of Appeals erred both in reading Title VII too restrictively and in applying Title VII analysis to the Equal Pay Act claim. Accordingly, petitioners request that this Court grant a writ of certiorari to clarify and correct the state of the applicable law.

DATED: White Plains, New York
June 8, 1987

Respectfully submitted,

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 161—August Term, 1986

(Argued: September 15, 1986

Decided: December 15, 1986)

Docket No. 86-7522

ANTHONY J. DECINTIO, PETER A. PIAZZA, MICHAEL A. GARAYUA, JOSE P. GOMES, ANGEL A. GARAYUA, WINSTON P. DAVID and DANIEL A. SAMUELS,

Plaintiffs-Appellees,

— against —

WESTCHESTER COUNTY MEDICAL CENTER; COUNTY OF WESTCHESTER,

Defendants-Appellants.

Before:

OAKES, MINER and MAHONEY,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Brieant, J.), imposing liability upon appellants for violating Title VII, 42 U.S.C. § 2000e-2 (1982), and the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982), by allowing preferential hiring based on romantic relationship.

Reversed.

ANNE GOLDEN, White Plains, NY (Silverman & Sapir, White Plains, NY, Donald L. Sapir, White Plains, NY, of counsel) *for Plaintiffs-Appellees.*

COLLEEN LUNDWALL KELLMAN, Assistant County Attorney, White Plains, NY (Kenneth E. Powell, Deputy County Attorney, Henry J. Logan, Westchester County Attorney, White Plains, NY, of counsel) *for Defendants-Appellants.*

MINER, *Circuit Judge*:

Appellees Anthony J. DeCintio, Peter A. Piazza, Michael A. Garayua, Jose P. Gomes, Angel A. Garayua, Winston P. David and Daniel A. Samuels, seven male respiratory therapists employed by appellant Westchester County Medical Center ("WCMC"), brought suit in the United States District Court for the Southern District of New York (Brieant, J.), alleging that WCMC and appellant Westchester County had discriminated against them on the basis of sex in violation of Title VII of the Civil

Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982), and the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982). The gravamen of their complaint was that they had been unfairly disqualified from promotion to the position of Assistant Chief Respiratory Therapist. They alleged that when the Program Administrator of the Respiratory Therapy Department, James Ryan, initiated the suggestion that registration by the National Board of Respiratory Therapists ("NBRT") be required of all applicants for the Assistant Chief position, he did so in order to disqualify them and to enable him to hire Jean Guagenti, a woman with whom he was engaged in a romantic relationship. The district court held that the provisions of both Title VII and the Equal Pay Act were violated and awarded damages to appellees and legal fees to their attorneys. We reverse.

I. BACKGROUND

In April 1982, WCMC opened a regional Neonatal Intensive Care Unit ("Neonatal ICU") for the treatment of critically ill newborns. The unit was staffed under the direction of Dr. Harry Dweck, who was also Chief of the Division of Neonatal Perinatal Medicine at New York Medical School. The staff consisted of nurses, therapists and lab technicians. WCMC decided to supplement the staff of the Neonatal ICU by adding a respiratory therapist with supervisory responsibilities, at a higher salary than other staff respiratory therapists. To that end, WCMC announced the creation of a position for an additional "Assistant Chief of Respiratory Therapy," to be assigned to the Neonatal ICU. Specifications for the position included a "special requirement" that the applicant be registered with the NBRT.[1] Registration by the NBRT

[1]There are two requirements for registration: prior experience as a respiratory care practitioner and successful completion of an examination given by the NBRT. Special knowledge or experience in neonatal care is not required.

previously had not been a requirement for the Assistant Chief position, nor was it required of the head of the Respiratory Therapy Department.

None of the appellees, all of whom were male staff respiratory therapists at WCMC, was registered by the NBRT. Consequently, none was qualified to apply for the position. On April 26, 1982, Jean Guagenti, a female respiratory therapist registered by the NBRT, was hired for the new position by the Westchester County Commissioner of Hospitals. The express recommendation of Ryan, the Program Administrator of the Respiratory Therapy Department, brought about her employment. Guagenti formerly had been employed at WCMC as a staff respiratory therapist until January 1982, when she left WCMC for a position at Danbury Hospital. After her return in April 1982, she worked in the Neonatal ICU until October 1982, when she was reassigned to another department. She resigned from WCMC on August 14, 1983.

On May 17, 1982, appellee Anthony DeCintio filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), charging Westchester County with sex discrimination arising from the hiring of Guagenti for the Assistant Chief Respiratory Therapist position. He alleged, *inter alia,* that the registration requirement was created in order to exclude him from consideration for the position and that the position specifically was created for Guagenti. The EEOC referred the complaint to the New York State Division on Human Rights ("State Division") for review of the merits of the case. On March 24, 1983, the other six appellees filed similar complaints with the State Division. The State Division's investigation resulted in dismissal of the complaint,

based on a lack of credible evidence that the certification requirement was pretextual. The EEOC adopted this finding.

After the appropriate review of the administrative determinations, appellees brought this action in the district court, alleging violations of Title VII and the Equal Pay Act. After a two-day trial, the district court determined that: 1) "[p]ersons other than" Ryan concluded that a respiratory therapist was needed in the Neonatal ICU; 2) Ryan initiated the creation of a second Assistant Chief position; 3) Ryan initiated the addition of a registration requirement for that position; 4) the new requirement was "a pretext and a part of a scheme or plan" on Ryan's part to obtain the position for Guagenti; 5) Ryan and Guagenti had been engaged in an ongoing, consensual, romantic relationship at the time Guagenti was hired to be an Assistant Chief at WCMC; and 6) appellants paid Guagenti more than appellees for equal work when the performance of their respective jobs required substantially equal skill, effort, or responsibilities performed under similar working conditions. Based on these findings, the district court held that appellants had violated the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII, 42 U.S.C. § 2000e. The court awarded damages and attorney's fees to each appellee. This appeal followed.

II. DISCUSSION

The dispositive issue in this action is whether, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1982), the phrase "discrimination on the basis of sex" encompasses disparate treatment premised not on one's gender, but rather on a romantic relationship between an employer and a person preferentially hired. The meaning of "sex," for Title VII purposes, thereby

would be expanded to include "sexual liaisons" and "sexual attractions." Such an overbroad definition is wholly unwarranted.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). As the Supreme Court noted in *Meritor Savings Bank, FSB v. Vinson,* 106 S. Ct. 2399 (1986), because the word "sex" was added to Title VII shortly before passage, "we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.' " *Id.* at 2404. However, the other categories afforded protection under Title VII refer to a person's status as a member of a particular race, color, religion or nationality. "Sex," when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender. As the Supreme Court noted in *Trans World Airlines v. Hardison,* 432 U.S. 63 (1977), "[t]he emphasis of both the language and the legislative history of [Title VII] is on eliminating discrimination in employment; similarly situated employees are not to be treated differently *solely because they differ* with respect to race, color, religion, sex, or national origin." *Id.* at 71 (emphasis added). The proscribed differentiation under Title VII, therefore, must be a distinction based on a person's sex, not on his or her sexual affiliations. *See Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines,* 444 F.2d 1194, 1198 (7th Cir.) (Title VII was intended to "strike at the entire spectrum of disparate treatment of men and women"), *cert.*

denied, 404 U.S. 991 (1971)); *see also Meritor*, 106 S. Ct. at 2404 (quoting same).

In *King v. Palmer*, 778 F.2d 878 (D.C. Cir. 1985), the D.C. Circuit implicitly recognized a Title VII action alleging discrimination premised on a voluntary sexual relationship. The court noted, however, that the question whether a consensual sexual relationship can form the basis of a Title VII claim had not been presented on appeal. *Id.* at 880. Additionally, six judges of that court, in denying a suggestion for rehearing *en banc* and a motion by the government regarding the filing of an *amicus* brief, emphasized that the applicability of Title VII to the facts before them was not raised on appeal, and thus was not the proper subject of a rehearing *en banc*. *Id.* at 883. To the extent that *King* and cases following *King*, *e.g.*, *Kersul v. Skulls Angels Inc.*, 130 Misc. 2d 345, 495 N.Y.S.2d 886 (Sup. Ct. 1985), can be interpreted as recognizing Title VII claims for non-gender based sex discrimination, we decline to adopt such a broad extension of Title VII protection.

Title VII claims have been employed successfully to combat instances of sex discrimination with respect to terms and conditions of employment, *e.g.*, *Mills v. Ford Motor Co.*, 800 F.2d 635 (6th Cir. 1986), as well as sexual harassment in the workplace, *e.g.*, *Meritor*, 106 S. Ct. 2399 (1986) ("hostile environment" sexual harassment); *see generally Annot.*, 78 A.L.R. Fed. 252 (1986). In all of these cases, however, there existed a causal connection between the gender of the individual or class and the resultant preference or disparity. Many courts have limited the word "sex" to its "traditional definition," *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982), and refused to extend Title VII proscrip-

tions beyond gender-based discrimination. *See, e.g. Ulane v. Eastern Airlines,* 742 F.2d 1081 (7th Cir. 1984) (transsexuality), *cert. denied,* 471 U.S. 1017 (1985); *Sommers v. Budget Marketing, Inc.,* 667 F.2d 748 (8th Cir. 1982) (same); *DeSantis v. Pacific Telephone & Telegraph Co.,* 608 F.2d 327 (9th Cir. 1979) (homosexuality); *Smith v. Liberty Mutual Insurance Co.,* 569 F.2d 325 (5th Cir. 1978) (effeminacy). We can adduce no justification for defining "sex," for Title VII purposes, so broadly as to include an ongoing, voluntary, romantic engagement.

Toscano v. Nimmo, 570 F. Supp. 1197 (D. Del. 1983), relied on by appellees, does not mandate a contrary result. In *Toscano,* a female employee alleged, and the district court found, that the granting of sexual favors was a condition to receiving promotion, in violation of Title VII. Although the district court permitted the female employee to prove her claim with circumstantial evidence of the sexual relationship between the employer and the successful applicant, the claim itself was premised on the coercive nature of the employer's acts, rather than the fact of the relationship itself. The Title VII action at issue in *Toscano,* therefore, was the substantial equivalent of a "sexual harassment" suit. The decision in *Toscano* lends no support to the contention that a voluntary amorous involvement may form the basis of a Title VII claim.

The EEOC's guidelines fail to buttress appellees' contentions. The guidelines provide that "[w]here employment opportunities or benefits are granted because of an individual's *submission* to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit." 29 C.F.R. § 1604.11(g) (1986)

(emphasis added). The word "submission," in this context, clearly involves a lack of consent and implies a necessary element of coercion or harassment. In addition, the EEOC has indicated that sexual relationships between coworkers should not be subject to Title VII scrutiny, so long as they are personal, social relationships. *See Preamble to Interim Guidelines on Sex Discrimination,* 45 Fed. Reg. 25024 (1980). While appellees do claim that the liaison between Ryan and Guagenti became more than a private affair when it affected their professional lives, appellees do not claim that they or any other staff members, including Guagenti, were forced to submit to Ryan's sexual advances in order to win promotion.

Even assuming that appellees' allegations are true and that the district court's findings are correct, appellees have not set forth a cognizable Title VII claim for sex discrimination. Appellees allege, and the district court found, that Ryan and Guagenti were engaged in a romantic partnership; that Ryan established a special requirement for the Assistant Chief position solely as a pretext to enable him to cause Guagenti to be hired; that appellees were precluded from applying for the position due to the special requirement; and that Guagenti was hired on the recommendation of Ryan. Ryan's conduct, although unfair, simply did not violate Title VII. Appellees were not prejudiced because of their status as males; rather, they were discriminated against because Ryan preferred his paramour. Appellees faced exactly the same predicament as that faced by any woman applicant for the promotion: No one but Guagenti could be considered for the appointment because of Guagenti's special relationship to Ryan. That relationship forms the basis of appellees' sex discrimination claims. Appellees' proffered interpretation of Title VII prohibitions against sex discrimination would

involve the EEOC and federal courts in the policing of intimate relationships. Such a course, founded on a distortion of the meaning of the word "sex" in the context of Title VII, is both impracticable and unwarranted.

Appellees' Equal Pay Act claim suffers the same fatal defect. The Equal Pay Act prohibits an employer from discriminating between employees "on the basis of sex by paying wages . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . ." 29 U.S.C. § 206(d)(1) (1982). Again, the problem confronting appellees is the proper definition of sex discrimination. The Supreme Court, in discussing the Equal Pay Act, made clear that the fundamental purpose of the Act was to remedy disparities in pay arising from traditional concepts of gender. *Corning Glass Works v. Brennan,* 417 U.S. 188, 195 (1974). We perceive no valid justification for defining "sex" for Equal Pay Act purposes in a manner inconsistent with the word's meaning under Title VII. Accordingly, appellees' Equal Pay Act claim must fail as well.

In sum, we hold that voluntary, romantic relationships cannot form the basis of a sex discrimination suit under either Title VII or the Equal Pay Act. Because that determination is dispositive of this appeal, we need not address the other issues raised by appellants.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is reversed.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - -X
ANTHONY J. DeCINTIO, et al.,

Plaintiffs, 84 Civ. 5566

-against-

WESTCHESTER COUNTY MEDICAL CENTER; COUNTY OF WESTCHESTER,

Defendants.

- - - - - - - - - - - - - - - - X

May 27, 1986
4:00 p.m.

Before:

HON. CHARLES L. BRIEANT,

District Judge

APPEARANCES:

Silverman & Sapir,
Attorneys for plaintiffs,
DONALD SAPIR,
ANNE GOLDEN,
of Counsel

ANTOINETTE M. MC CARTHY,
Attorney for defendants.

(After trial)

THE COURT: The court makes the following findings of fact and conclusions of law following a trial.

After I finish announcing the findings and conclusions, I will invite each attorney to make additional requests.

Plaintiffs are or were at all relevant times staff respiratory therapists at the Westchester County Medical Center, and were employees of the County of Westchester, and they allege they have been discriminated against on the basis of sex in violation of Title VII otherwise codified as 42 U.S. Code Section 2000 (e), and also that their rights under the Equal pay Act of 1963, 29 U.S. Code Section 206(d) were violated.

The court has subject matter jurisdiction under Section 1331 of Title 28 and also Section 1343, subparagraph 3 of

the same title, and has in personam jurisdiction over the defendant, which is really a single entity, the County of Westchester; which is a municipal corporation, and which operates the Medical Center as one of its municipal functions.

The court also has subject matter jurisdiction over the Title VII claim in that the plaintiffs sought timely relief from the New York State Division of Human Rights, and a right-to-sue letter was issued to Mr. DeCintio, and the court finds the other plaintiffs similarly situated, and that notice is adequate to support what in effect is a class action without a class certification here.

Insofar as concerns Title VII, the court notes that plaintiffs must prove by a preponderance of the credible evidence the prima facie case of sex

discrimination, and once that is established if it is, the burden of going forward shifts to the defendants to articulate some legitimate, bona fide, nondiscriminatory reason for the employees' rejection; and once the defendant has presented the articulation of a legitimate, nondiscriminatory reason for the employees' rejection, the plaintiffs then have the burden of proof by a preponderance of credible evidence that the reasons offered by the defendant are only a pretext to cover up discrimination in the case.

The court relies on the well known authority of Burdine and McDonnell-Douglas v. Green, which everybody is familiar with.

As part of that prima facie case, the plaintiffs have to show that they were qualified and that they were rejected; that the gender-based relationship

between the employer, in this case Mr. Ryan acting for the employer, and Ms. Guagenti, was a substantial factor in the rejection of the plaintiffs.

The court relies on King v. Palmer, 778 Fed. 2d, 878, a D.C. Circuit case recently decided.

The court finds that each of these plaintiffs at the relevant times were employed as staff respiratory technicians in 1982 at the Westchester County Medical Center in Valhalla, New York, commonly sometimes referred to as Grasslands; that as such they were members of the department of respiratory therapy of the Medical Center and Mr. Ryan was the administrative head of that department and the person to whom each of these persons reported.

The primary duties of the department are to provide respiratory therapy to patients as ordered and prescribed by

physicians, and to maintain the equipment and facilities used for doing that, and to perform such other related work as is directed.

In April 1982 the hospital opened a new intensive care regional unit to look after socalled neonates requiring special treatment. In the beginning it was the practice to transport infants in need of immediate intensive care from other hospitals since the obstetric ward in the hospital had not yet been activated when this center opened.

Persons other than Mr. Ryan concluded that a respiratory technician whose responsibility would be to supervise and operate this intensive care unit should be allocated as a job position. The matter then came into the hands of Mr. James Ryan, the chief respiratory therapist, and I find that the idea initiated with him to have the position

require as a qualification registration with the socalled NBRT, which has been referred to throughout the trial, the National Board of Respiratory Therapists. This registration is not directed specifically towards the care of neonates, and registration ensues from adequate experience followed by passing an examination given by this national board, which has previously been known by different names and is referred to in the trial record here, and the court, for each of reference, will simply use the word "registered" as denoting people who have been so registered after passing the examination.

The court finds that the idea initiated with Mr. Ryan that the title of assistant chief respiratory therapist be created, and the position already existed but that an additional assistant chief be created for the purpose of this

intensive care unit with the added requirement that the person selected must be registered with the NBRT. The hospital had never previously imposed this requirement for any respiratory therapist position, including the chief of the department, Mr. Ryan, although he did in fact hold that position of having been registered by the NBRT.

Plaintiffs claim, and I find, that this new requirement was a pretext and a part of a scheme or plan on the part of Mr. Ryan to arrange for the appointment of Ms. Jean Guagenti in this position.

Plaintiffs contend, and I find, that Mr. Ryan was having at all relevant times a personal relationship with Ms. Guagenti of a romantic nature. She first worked at the Medical Center as a staff respiratory therapist in February 1980. She resigned in February 1982 to

take a similar position at the Danbury Hospital for a better salary.

At the time she left the Westchester Medical Center, Ms. Guagenti was a Grade 8 on the pay scale and earning $16,550 per year. When she returned three months later in April 1982 as assistant chief respiratory therapist, she was hired at grade level 9, and her annual salary was $19,315.

A romantic relationship cannot be proved directly, and the court agrees that very seldom does anything meretricious occur in a restaurant. However, a number of witnesses testified to instances which I find to be fairly portrayed to the court in the trial record and which can be reasonably interpreted and fairly interpreted as circumstantial evidence of the fact that at all relevant times Ms. Guagenti and Mr. Ryan were at least emotionally

involved in a romantic way, and I so find.

Mr. Garayua testified, and I find, that Ms. Guagenti and Mr. Ryan would leave the hospital together about two times per week. He didn't follow this practice with any of the other therapists. Several witnesses testified to what may be described as romantic moments in a bar where the therapists frequented after they went off duty, known as Gasho. Witnesses described hand-holding and fixed gazes and arranging to sit together consistently and generally fawning all over each other; and even allowing for some exaggeration, which the court does not doubt there is, the court believes that these people were clearly romantically involved with one another.

This matter ripened later to a point where they moved in to live together and

indicated an expectation of marrying when their applicable divorce decree became available.

The court notes that in May or June of 1982, while in Gasho in the presence of others in his department, Mr. Ryan directed Ms. Guagenti not to respond to her beeper which was sounding for an emergency response, probably to make a transportation of an infant requiring neonatal care; and although she was on call at the time and paid extra for being on call and carrying the beeper, he nonetheless told her not to bother to respond. This is highly significant evidence of favoritism, and together with the other proof in the case indicates that the favoritism was of a sexual nature.

Ms. Guagenti was apparently alone in frequenting Mr. Ryan's office during working hours as often as she did, and

he frequently sought her attention by telephone. There is credible evidence that the office door was invariably closed when they were together there; that laughter was heard outside; and at all times, whether or not she was in the office the windows were blocked by hanging sheets; and the court finds this sexual relationship leading to sexual favoritism has been amply proved on this trial record.

The court notes that the collective bargaining agreement between the hospital and its employees provides that the Medical Center will promote employees from within the hospital when one of the employees meets the job requirements, and also under the collective bargaining agreement any job vacancies must be posted in the relevant department for ten days.

I am satisfied that a notice was posted somewhere in the hospital on April 20, 1982, but I believe the testimony here that such a notice was never posted in the relevant department, and that none of these plaintiffs saw the assistant chief respiratory therapist position notice when it was posted on April 20, 1982.

However, through the efforts of Ryan, Ms. Guagenti was hired less than ten days later, and on April 27, 1982.

The court finds that the idea of registration as a job criterion originated with Mr. Ryan, and that the other participants agreed innocently with this job specification because it sounded good and it was helpful in getting the personnel office to reclassify the position for higher pay.

However, as I said earlier, I think it is clear on this trial record that it

was not a bona fide occupational qualification. In the first place, it is possible to be registered without having direct experience at taking care of neonates, and the real interest of Dr. Dweck was that someone be fully familiar with the care of neonates, and he was not specifically interested in the qualification. He was interested in better people with experience, and he was interested in a higher salary for the job, but he did not specifically demand registration; and as I said earlier, I find that the registration originated with Mr. Ryan, as contemporary documents clearly show, especially Exhibit 6; and all the evidence in the case traces this to Mr. Ryan as a pretext to advance the interests of his friend, this Helen of Troy who launched seven lawsuits.

The court notes in support of its conclusion that it was not a BFOQ, that the doctors allowed nonregistered people to work in the neonatal unit and also to do transports, and also nonregistered therapists covered the unit from the very beginning on the times when Ms. Guagenti was not on duty.

Dr. Dweck had approved a formal training schedule, which was not offered in evidence but apparently exists in writing, to allow people to qualify for work in the unit, and there was testimony that the training given pursuant to that plan was as brief as four hours. Even allowing for slight exaggeration on that point, the court finds that any of the nonregistered therapists in the hospital could learn the work of the neonatal unit with relative ease, and furthermore they did do the work to the extent that they were able to do so

during the times when Ms. Guagenti was off shift.

There came a point where Dr. Dweck in effect removed Ms. Guagenti from the neonatal unit and thereafter the work was done wholly or in part by nonregistered persons.

The court finds that after being ejected from the unit for malfeasance or misfeasance or however we wish to characterize it, that Ms. Guagenti was placed on the night shift as an alleged assistant chief, but that she never did any different work at night than the others did, and that at night the senior person on the shift did whatever supervision was necessary; and I believe the testimony to the effect that she did the same work as everybody else although for a higher pay grade until August 14, 1983, when she left.

The court finds all of the stipulated facts, and the court will now consider some of the requested findings on the part of the defendant. I gather we have no written requests from the plaintiffs, is that right?

MR. SAPIR: Yes, your Honor. We do have proposed findings which were given to chambers at the outset of the trial.

THE COURT: All right. I am dealing now with the defendant's requests.

To the extent not inconsistent with the oral findings of the court previously announced on the record, the court finds defendant's request number 1, number 2. I decline to find number 3, which I think is largely argumentative.

Number 4 is found. Number 5 is found. The oourt finds as to number 6 that apparently none of the plaintiffs could meet the special requirement of registration, and that that fact was

well known to Mr. Ryan, and the requirement of registration was a stratagem on his part in order to aid the interests of his special friend.

Request number 7 is rejected, and the court declines to so find.

Insofar as 8 is concerned, the court believes that the persons in the command chain above Ryan were not acting with a discriminatory purpose and were not necessarily aware of what he was doing. However, the idea of registration as an occupational requirement originated with Ryan. The other people, including particularly Mr. Armet, Dr. Dweck, and the personnel office of the county participated innocently in this scheme without knowledge of the true motivations of Mr. Ryan.

There certainly should have come a time when they should have known, but I

needn't get into that, and I find that the conduct of Ryan directly caused the injury to these plaintiffs, and that the defendant is responsible for the conduct of the head of the department in this regard, Mr. Ryan.

Insofar as request number 8 is concerned, I find that the motivation therein set forth applied to all participants except Ryan.

I decline to find number 9. I find that the idea originated with Ryan, and the rest of the participants approved it believing that it sounded good and that it would be a basis to get a higher pay grade for someone to work in the neonatal unit.

The court finds that the defendants paid Ms. Guagenti more than the male plaintiffs, and that she is a female, and they did so for equal work on jobs the performance of which required

substantially equal skill, effort, or responsibility, and which was performed under similar working conditions.

The court finds that the plaintiffs are entitled to the pay differential between the time that Ms. Guagenti started work through August 14, 1983 or when they left the service, whichever is earlier, and the court directs that a schedule for each plaintiff be served on opposing counsel for purpose of inclusion in a final judgment.

The court also finds that the plaintiffs are entitled to their costs and disbursements and to a legal fee as a prevailing party in a civil rights action.

The court will now entertain requests for additional findings and conclusions.

Mr. Sapir, is there anything else you want the court to find? You will have

to submit a schedule of your legal services, your hours, what you did.

MR. SAPIR: Yes, your Honor, we will be happy to do so.

THE COURT: Serve it on opposing counsel.

MR. SAPIR: Yes your Honor.

We would request that the court -- there would have been assistant chief respiratory therapists for at least one of these people had the favoritism not been granted to Ms. Guagenti, that for that reason one of these individuals be made an assistant chief respiratory therapist.

THE COURT: I decline to so direct. I think that is outside the scope of the matter, and as the matter presently stands, Mr. Ryan has left the employ of the defendant, and there is no showing that anyone now is maintaining this

requirement against the interests of your clients.

If it were not for the sexual favoritism so clearly proved here, the court would not attempt to substitute its judgment. In other words, this was a scheme that sounded good, sounded plausible. The only thing that made it inappropriate was the sexual favor.

MR. SAPIR: We would also request that because of the grandfathering provision that would have permitted anybody who was not a registered therapist to remain in that position after the requirements changed, and as they did change in 1984, that for that reason the damages should continue to date.

THE COURT: I decline to so direct. I have the belief, however, that you have some rights under the Civil Service Law and under the collective bargaining agreement, and they are not really

tendered in this case. I think your clients can get a remedy. I decline to so direct in this lawsuit. I think if you are made whole on your pay to the present date or through August 14, when the sex discrimination ended, that is fair enough.

Are you finished?

MR. SAPIR: Yes, your Honor.

MS. MC CARTHY: If your Honor please, I would like to have a finding if possible that had the decision or the consensus not been by Dr. Dweck and by administration that none of these plaintiffs were qualified for the position, there would never have been an upgrading of the position.

THE COURT: I decline to so find. I find that there is no evidence here that they were not qualified for the position once they received this additional training which was ordered by Dr. Dweck

and apparently given only in part, and in some cases as little as four hours of it, and I find further that the hospital recognized that they were qualified because the hospital allowed them to do the work, and they allowed Smith to do the work; and so I think that the consensus occurred because these people were victimized by Mr. Ryan. They were misled and gulled.

MR. MC CARTHY: If your Honor please, I would also if possible on damages, the issue as to the fact that only one person would have had the position --

THE COURT: They are all entitled to equal pay for equal work, so I don't see any --

MS. MC CARTHY: Would you say that equal pay for equal work went from October?

THE COURT: Went from April, whenever they took her on board at this higher pay.

All right, thank you very much. That constitutes the court's findings of fact and conclusions of law after trial.

How soon can a judgment be gotten into our hands so everybody can take their appeal and their cross appeal?

Off the record.

(Discussion off the record.)

THE COURT: Back on the record, it is understood that the court will receive a proposed judgment either with waiver of notice or notice of settlement by the end of the week.

Thank you very much.

APPENDIX C

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - X

ANTHONY J. DeCINTIO, PETER A. PIAZZA, MICHAEL A. GARAYUA, JOSE P. GOMES, ANGEL A. GARAYUA, WINSTON P. DAVID AND DANIEL A. SAMUELS,

Plaintiffs,

-against-

WESTCHESTER COUNTY MEDICAL CENTER: COUNTY OF WESTCHESTER,

Defendants.

84 CIVIL 5566-CLB

JUDGMENT

- - - - - - - - - - - - - - - - X

Whereas the above entitled action having been assigned to the Honorable Charles L. Brieant, Chief, U.S.D.J. and the United States Court of Appeals for the Second Circuit having handed down its mandate received in the Clerk's Office on April 6, 1987 reversing the judgment of the District Court, IT IS

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby

dismissed, with costs to be taxed against the appellees.

DATED: April 16, 1987

White Plains, New York

Raymond F. Burghardt

Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of March one thousand nine hundred and eight-seven.

ANTHONY J. DeCINTIO, PETER A. PIAZZA, MICHAEL A. GARAYUA, JOSE P. GOMES, ANGEL A. GARAYUA, WINSTON P. DAVID AND DANIEL A. SAMUELS,

Docket No. 86-7522

Plaintiffs-Appellees,

-against-

WESTCHESTER COUNTY MEDICAL CENTER: COUNTY OF WESTCHESTER,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Plaintiffs-Appellees

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

APPENDIX D

APPENDIX D

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON D.C. 20506

IN THE MATTER OF THE REQUEST TO REOPEN BY	)	REQUEST NO 05830088
UNITED STATES POSTAL SERVICE	)	

The United States Postal Service (hereinafter referred to as agency) filed a request that the Equal Employment Opportunity Commission reopen and reconsider its decision in Marilyn Alley v. United States Postal Service, Appeal No. 01820227.

EEOC Regulation 29 C.F.R. Section 1613.235 sets forth the criteria for reopening a previous decision of this Commission. Under the Regulation, the Commissioners may, in their discretion, reopen and reconsider any previous decision if the party requesting reopening and reconsideration submits written evidence of arguments which tends to meet one or more of the

prescribed criteria. The agency requested reopening pursuant to the above regulation.

This Commission has reviewed the agency's request, arguments put forth, the record of the prior complaint and the previous decision in view of the present arguments. The Commission finds that the agency's request meets the requirements set forth in 29 C.F.R 1613.235 and for this reason accepts the agency's request to reopen.

In our previous decision in appeal No. 01820227, we found that the agency had violated 29 C.F.R. 1604.11(g) of the Commission's regulations on Sexual Harassment. That section provides as follows:

> (g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who

were qualified for but denied that employment opportunity or benefit.

Upon Request to Reopen our decision in Appeal No. 01820227, the agency pointed out, inter alia, that the Complaints Examiner had specifically found (see recommended decision, p. 20, last sentence) that appellant had not proven that (an)other female employer(s) had been transferred to clerical positions (generally preferred over carrier duties) because of (her) their submission to the supervisor's sexual advances or requests for sexual favors. In our decision in Appeal No. 01820227, we referred to the testimony of a female employee who admitted to having engaged in sexual activity with one of the two alleged discriminating officials (ADO's). In essence, that employee's testimony was to the effect that neither ADO was sympathetic to her work-related

problems once she remarried, but that prior to her re-marriage

> ". . . they kept (her) inside doing (the preferred) clerk work even though (she) was a carrier. And (she) was given to understand that if (ADO) got a position for a secretary (she) would be given it." (H.T., p. 185).

We disagree with the Complaints Examiner's findings that there was no cause and effect relationship between this particular female employee's acquiescence to her employer's sexual advances or requests for sexual favors and her having been assigned to (the preferred) clerical work. We do so in spite of the fact that the Complaints Examiner was in a position to observe the demeanor and credibility of the witnesses. We are of the opinion that the Complaints Examiner merely overlooked the significance of the above-quoted testimony. In addition, we note that at several points in her recom-

mended decision, the Complaints Examiner attacked the credibility of the ADO's, but not once did she attack the credibility of the above-referenced female witness.

Moreover, we find that Section 1604.11(g) applies to the facts of this case despite the fact that appellant acknowledges that she was not the direct object of her employer's request for sexual favors. We find that she has standing to raise a violation of Section 1604.11(g) under these circumstances for two reasons. First, as discussed above, we find the existence of a cause and effect relationship between the above-mentioned other female employee's acquiescence to her employer's request for sexual favors, on the one hand, and her having been granted employment opportunities or benefits, on the other.

Second, appellant was qualified for the same employment opportuntiies or benefits, but did not receive them. In short, appellant is not required to show that she was denied such employment opportunity or benefit as a direct result of appellant's having rejected her employer's request for sexual favors. It is enough that she has shown that another female employee was granted such employment opportunity or benefit for such reason. Put still another way, we think appellant has stated a prima facie case of sexual discrimination under Section 1604.11(g), and the agency has not stated a legitimate, non-discriminatory reason for its grant of such employment opportunity to the other female employee, but not to appellant. We agree with the Complaints Examiner's conclusion that the ADO's attempts to

characterize appellant as an inefficient employee are pretextual.

Moreover, in the application of Section 1604.11(g) to the facts of this case, we see no requirement that the conduct acquiesced in by the other female employee have been "unwelcome" as that term is used in Section 1604.11(a).[1]

We find that Section 1604.11(g) applies with equal force to a situation in which the acquiescence of the other female to her employer's request for sexual favors was consensual, as in this case. Section 1604.11(g) draws no distinction between "unwelcome" as opposed to consensual behavior. Because

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[1] In this connection, we note that Section 1604.11(a) begins as follows:

> ". . . Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . "

we rely on an application of Section 1604.11(g) to the facts of this case to reach our finding of discrimination, we need not and do not discuss the agency's argument that appellant lacks the standing to bring a claim of sexual harassment insofar as that argument relates to Section 1104(a).

CONCLUSION

For the record, then, we clarify our previous decision as follows. The last sentence beginning at page 2, line 22 of our previous decision in Appeal No. 01820227 is amended to read as follows:

> Accordingly, we reverse the agency's finding of no discrimination based upon sexual harassment. We do find sex discrimination under Section 1604.11(g) of the Commission's Regulations. Since we make this finding, it is not necessary to address the question of whether or not the agency engaged in sexual harassment against appellant under

Section 1604.11(a) of the Commission's Regulations.

NOTICE OF POSSIBLE RIGHT TO FILE CIVIL ACTION

The appellant may have a right to file a civil action in the appropriate United States District Court within 30 calendar days from receipt of the decision on the request to reopen and reconsider.

FOR THE COMMISSION:

DATE: 10/31/84

Executive Secretary
to the Commission

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

Marilyn Alley	)	
	)	
Appellant,	)	Appeal Number
	)	01820227
v.	)	
	)	
U.S. Postal Service	)	
Appellee.	)	
	)	

DECISION

On October 27, 1981, Marilyn Alley the agency issued the attached decision in this proceeding. Also attached is the complaints examiner's recommended decision. Thereafter, appellant filed the present appeal.

The complaints examiner recommended a finding of discrimination.

The appellant alleged discrimination based on sexual harassment.

The appeal is brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e et seq.

The appeal is accepted by the Equal Employment Opportunity Commission (EEOC)

in accordance with the provisions of EEOC Order number 960, as amended.

Appellant admitted that neither of the alleged discriminating male officials had made unwelcome sexual advances toward her, nor had either of them requested sexual favors from her. The thrust of her case was that the manager(s) had exhibited such conduct toward other female employees and that, as a result, these other females had received employment opportunities and benefits which were denied her.

29 C.F.R. 1604.11(g) of the Commission's regulation provides as follows:

> "Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit."

We think that appellant's outspoken expressions of disapproval of the aforementioned conduct on the part of her manager(s) formed the basis for employment decisions which adversely affected here, if only in the indirect sense that, absent the prohibited conduct, such decisions (1) might not have been made or (2) might have been made to her benefit instead of to the benefit of others. The regulations were intended to protect persons who, like appellant, were qualified for employment opportunities or benefits which, because of the prohibited conduct, went to others.

In this case, one female former employee who admitted to having granted sexual favors to one of the managers testified that she had been given the largely preferred clerical work to do while on light duty, even though she,

like appellant, was a carrier. (H.T., p. 185). And yet appellant's request for such work was never granted, even at a time when she had hurt her hand and found sorting mail painful. We find that 29 C.F.R. 1604.11(g) was intended to benefit persons who were not the objects of the acts of sexual harassment per se, but who, like appellant, were denied employment opportunities or benefits as an indirect result of such conduct. Accordingly, we reverse the agency's finding of no discrimination based upon sexual harassment, and we direct the agency to implement the corrective action recommended at page 25 of the complaints examiner's attached recommended decision.

IMPLEMENTATION OF THE COMMISSION DECISION

Under EEOC regulations, compliance with the Commission's corrective action

is mandatory. The agency must report to this Commission, within thirty (30) calendar days of receipt of the decision, that corrective action has been taken. The agency report should be forwarded to the Compliance Officer, Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. A copy of the report should be sent to the appellant.

NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to 29 C.F.R. Sec. 1613.282, the appellant is hereby notified that this decision is final and that appellant has the right to file a civil action on the Title VII claim in the appropriate United States District Court within thirty (30) days of the date of receipt of this decision.

ATTORNEY'S FEES

If Appellant has been represented by

a member of the Bar, appellant shall be awarded attorney's fees under 29 C.F.R. Section 1613.271(c). The attorney shall submit to the agency within twenty (20) days of receipt of this decision, the documentation required by 29 C.F.R. Section 1613.281 (c)(2). The agency shall process the claim within the time frames set forth in Section 1613.271 (c)(2).

APPOINTMENT OF COUNSEL

If you choose to file a civil action, and you do not have, or are unable to obtain the services of a lawyer, you may also request the court to appoint a lawyer to represent you. In such circumstances as th court may deem just, the court may appoint a lawyer for you and may authorize the commencement of the action without the payment of fees, costs or security. Any such request must be made within the above referenced

30 day time limit and in such form and manner as the court may require.

NOTICE OF RIGHT TO REQUEST REOPENING

The appellant and the agency are hereby notified that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued;

2. The previous decision involves an erroneous interpretation of law or regulations or misapplication of established policy; or

3. The previous decision is of precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an excep-

tional nature as to merit the personal attention of the Commissioners.

This notice is in accord with 29 C.F.R Sec. 1613.235. As provided therein, agency requests to reopen must be filed within 30 days from the date of receipt of the decision.

FOR THE COMMISSION

OCT. 8 - 1982

DATE

MARTIN I. SLATE,
Acting Director
Office of Review and
Appeals

Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANTHONY J. DeCINTIO, PETER A. PIAZZA, MICHAEL A. GARAYUA, JOSE P. GOMES, ANGEL A. GARAYUA, WINSTON P. DAVID and DANIEL SAMUELS,

Petitioners,

vs.

WESTCHESTER COUNTY MEDICAL CENTER; COUNTY OF WESTCHESTER,

Respondents.

BRIEF OF RESPONDENTS WESTCHESTER COUNTY MEDICAL CENTER AND COUNTY OF WESTCHESTER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Do male petitioners, who were subjected neither to sexual harassment or circumstances different from similarly situated women, have a claim for a violation of the sex discrimination provisions of Title VII of the Civil Rights Act of 1964, when an individual woman, with a recognized superior professional credential, is claimed to have been hired to a newly created position due to a voluntary romantic engagement with a middle-level supervisor, where top-level management established the requirement for the position and made the hiring decision for non-discriminatory reasons unaware of any motive of that supervisor?

2. Do male Staff Respiratory Therapists at a hospital, have a claim for violation of the Equal Pay Act,

when the hospital employer creates for non-discriminatory reasons not involving gender, a new higher-paying respiratory therapy position in a newly-opened Intensive Care Unit for critically ill newborns, and hires a woman with superior skills for that position who possesses a recognized superior professional credential, which the Staff Therapists do not possess, and which commands a higher salary in the marketplace?

3. Whether the District Court's findings were clearly erroneous that petitioners were qualified to provide respiratory therapy services in the Neonatal Intensive Care Unit of Westchester County Medical Center, had performed equal work under similar working conditions requiring equal skill, effort and responsibility, and that there existed a romantic

relationship between John Ryan and Jean Guagenti at the time of hire?

4. Assuming the correctness of the District Court findings, whether an employer under the Equal Pay Act and Title VII of the Civil Rights Act of 1964 is liable when a middle-level supervisor arranges for the hiring of an employee with whom he is romantically engaged where the top-level management is unaware of the motive of the supervisor and acts for non-discriminatory reasons?

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CITATIONS OF OPINIONS BELOW

Respondents accept the Petition's citation of the opinions below except that certain findings made by the District Court, referred to by number in the District Courts findings [Pet. App. B, pp. A 27-29], are not included in Petitioners' Appendix. These additional findings, other than stipulated facts, are reproduced in Appendix A to this Brief.

STATEMENT OF THE CASE

In April of 1982, Westchester County Medical Center ("WCMC") opened a regional Neonatal Intensive Care Unit ("Neonatal ICU") for the treatment of critically ill newborns.

WCMC decided to add to the Neonatal ICU an Assistant Chief of Respiratory Therapy position at a higher salary than staff respiratory therapists. Specifications for the new position included a "special requirement" that the applicant be registered with the National Board of Respiratory Therapists ("NBRT").*

On April 26, 1982, Jean Guagenti,

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*Registration by the NBRT is a credential which may be obtained by a respiratory therapy practitioner, and requires successful performance of an examination administered by that Board together with previous experience as a respiratory therapy care practitioner. 807 F.2d at 305, n.1.

a female respiratory therapist registered by the NBRT, was hired for the new position by the Westchester County Commissioner of Hospitals on the recommendation of John Ryan, the Program Administrator of the Respiratory Therapy Department.*

Male petitioners, none of whom were then registered by the NBRT, filed complaints with the EEOC and New York State Division on Human Rights charging sex discrimination, which complaints were dismissed based on a lack of credible evidence that the NBRT registry requirement was pretextual.

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*The statement at page 3 of the Petition that Ryan made the decision to adopt the NBRT registration requirement and to hire Guagenti is not completely accurate. Ryan, according to the District Court, originated the idea for registration (Pet. App. B pp. A16, 23) and recommended hiring Guagenti to the Commissioner of Hospitals.

Thereafter, petitioners commenced this action in the District Court alleging that they had been disqualified from promotion due to a sexual relationship between Ryan and Guagenti, in violation of the Civil Rights Act of 1964, 42 U.S.C. §2000-e(2) and the Equal Pay Act, 29 U.S.C. §206(d)(1). None of the female Staff Respiratory Therapists were parties to the suit.

After a bench trial, the District Court held that the provisions of both Title VII and the Equal Pay Act were violated, finding that a romantic relationship existed between Ryan and Guagenti when she was hired, that the registration requirement for the Assistant Chief position was a pretext by Ryan to secure the position for Guagenti, and that Petitioners performed substantially the same work

as Guagenti. The Court awarded $19,374.30 in total to Petitioners and $43,513.00 in legal fees.

The District Court also concluded that top administrators of WCMC were unaware of Ryan's motive, which related only to him, and had non-discriminatory reasons for their actions, to wit: to upgrade the therapist assigned to the Neonatal ICU, and, in addition, to begin a process to upgrade the entire Respiratory Therapy Department. Pet. App. B. p.A29, Res. App. A, p.A3.

The Court of Appeals for the Second Circuit reversed. 807 F.2d 304 (2d Cir. 1986). The Court of Appeals concluded that discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964 or the Equal Pay Act, did not encompass disparate treatment premised not upon one's

gender, but upon a voluntary romantic relationship between the employer and the person preferentially hired.

In so reversing, the Second Circuit did not embrace the District Court's findings, but assumed for purposes of its opinion the correctness of the District Court's findings.* 807 F.2d 308.

On March 9, 1987, Petitioners' petition for rehearing with a suggestion for re-hearing in banc, was denied.

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*The statements made in the petition at pages 9 and 11 that the Court of Appeals left the District Court's findings "undisturbed" is an incomplete explanation of the Court of Appeals' treatment of those findings.

SUMMARY OF ARGUMENT

This case is not of special importance and the Court of Appeals' decision conflicts neither with decisions of this Court nor other Circuits. Moreover, this case is encumbered with serious, multiple, and unsettled factual issues as underscored by the Second Circuit's refusal to embrace as its own the District Court findings.

Unraised below, Petitioners may not argue a hybrid species of sexual harassment in this Court. Petitioners' contentions with respect to the gender-based purview of the sex discrimination provisions of Title VII and the Equal Pay Act, are best addressed to Congress.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Petition does not present special or important reasons warranting review.

Petitioners assert that the Court of Appeals for the Second Circuit erroneously applied the sex discrimination provisions of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act.

This Court, however, has never regarded its function as merely to correct a legal error perceived by a disappointed litigant in a lower Court decision. To the extent Petitioners seek clarification or a change of federal statutory law, that role is best left to Congress.

As recognized by the Second Circuit's opinion, Petitioners here asserted non-gender-based claims which

are beyond the purview of Title VII and the Equal Pay Act. 807 F.2d at 306, 308. The Court drew upon opinions of this Court in Meritor Savings Bank, FSB v. Vinson, 106 S.Ct. 2399 (1986), Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702, 707, n.13 (1978), Trans World Airlines v. Hardison, 432 U.S. 63 (1977) and Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) in support of its analysis.

Nor do the regulations of federal agencies administering the Equal Pay Act and Title VII support Petitioners' claims. 29 C.F.R. Part 800 et seq.; 29 C.F.R. §1604.11(g). Petitioners were not discriminated against on the basis of their gender. 807 F.2d at 308.

Contrary to Petitioners' contention that the Court erroneously applied Title VII analysis to the

Equal Pay Act, the Court below found that the case was not gender-based and it is gender-based wage differentials for equal work that is the subject of the Equal Pay Act. The Act proscribes wage discrimination "on the basis of sex" and excludes differences based "on any other factor other than sex." 29 U.S.C. §206(d)(1)(iv).

Petitioners' analysis is also inconsistent. When it suits their purposes, Petitioners invoke a pretext argument borrowed from their Title VII claim to overcome the non-gender-based, non-discriminatory reasons for the creation of the disputed job position. Petition pp. 9, 10.

B. There is no conflict between the Court of Appeals decision below and decisions of this Court

Contrary to Petitioners' suggestions, there is no conflict

between the decision of the Court of Appeals for the Second Circuit and decisions of this Court in County of Washington v. Gunther, 452 U.S. 161 (1981) and Corning Glass Works v. Brennan, 417 U.S. 188 (1974); each involved gender-based claims of discrimination in wages not presented here.

Nor is there any conflict between the lower Court's disposition and Meritor Savings Bank, FSB v. Vinson, 106 S.Ct. 2399 (1986) which recognized certain forms of sexual harassment claims under Title VII, not relevant here.

C. No sexual harassment claim was raised by Petitioners.

Petitioners were not subjected to sexual advances (807 F.2d at 308) and made no "hostile environment" claim below. No mention of sexual

harassment in any form appears in either the District Court or Court of Appeals' decisions. Rather, Petitioners claimed that a supervisor displayed favoritism toward an individual woman with whom he had a voluntary romantic-engagement.

As stated by the Second Circuit: "Guagenti's special relationship to Ryan" was the gravamen of Petitioners' claim. "That relationship forms the basis of appellee's sex discrimination claims." 807 F.2d at 308.

After the Second Circuit rendered its opinion, Petitioners in a motion for rehearing belatedly attempted to introduce a hybrid species of a hostile environment theory. Beyond untimeliness, the new theory disregards that sexual harassment is based on unwelcome sexual conduct. 29 C.F.R. §1604.11(a)(1986).

D. There is no conflict among the Circuits

There is no conflict among the Circuits on the Equal Pay Act issue Petitioners seek to raise.*

Petitioners cite the Title VII decision of the District of Columbia Court of Appeals in King v. Palmer, 778 F.2d 878 (D.C. Cir. 1985) to show a Title VII conflict among the Circuits, justifying a grant of a writ of certiorari. The conflict is illusory.

After King v. Palmer was decided

*The Circuits generally construe Title VII and the Equal Pay Act harmoniously. Orahood v. Board of Trustees of the University of Arkansas, 645 F.2d 651, 654 (8th Cir. 1981); Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 446 (D.C. Cir. 1976) cert denied 434 U.S. 1086 (1978); Orr v. MacNeill and Sons, Inc., 511 F.2d 166, 170 (5th Cir. 1975) cert denied 423 U.S. 865 (1975); Ammons v. Zia, 448 F.2d 117, 119 (10th Cir. 1971); Shultz v. Weaton Glass Company, 421 F.2d 259, 266 (3d Cir. 1970) cert denied 398 U.S. 905 (1970).

by a three-judge panel, six other judges of that Court, denying a suggestion for a rehearing in banc and a motion by the United States regarding the filing of an amicus brief, emphasized that the applicability of Title VII to the facts before that Court had never been raised and therefore was not properly the subject of a rehearing in banc. 778 F.2d at 883.*

*The EEOC decision in United States Postal Service, Reg. No. 05830088 cited by Petitioner (Petition p. 21) is distinguishable in several respects from the case at bar. Like King v. Palmer, it is premised on an existing employer-employee relationship, not present here at time of hire with respect to Guagenti. Further, in United States Postal Service, there were requests for sexual favors or sexual advances. At bar, there was no showing of such requests or advances initiated by Ryan, nor "submission" to such requests or advances by Guagenti.

As a result, it is apparent that King v. Palmer is not even precedent within the D.C. Circuit, and, if a comparable case arises, that Circuit must treat the issue as if presented for the first time.

In any event, King v. Palmer involved a hostile environment claim not presented here. 778 F.2d at 880, 883.

E. This case is encumbered by serious factual issues.

In order to address any issues of the case, the Court would be drawn into unsettled and multiple factual issues.

In its opinion below, the Second Circuit declined to embrace as its own the District Court's findings of fact, prefacing its rendition of facts with "[e]ven assuming the appellees' allegations are true and the district court's findings are correct,

appellees have not set forth a cognizable Title VII claim for sex discrimination." 807 F.2d at 308.

Concluding its opinion, the Second Circuit again noted that "[b]ecause that determination is dispositive of this appeal, we need not address the other issues raised by appellants." 807 F.2d at 308. These other issues included arguments that the District Court's findings were clearly erroneous.

The District Court findings are inconsistent with the findings made by the EEOC and the New York State Division on Human Rights, which agencies dismissed Petitioners' administrative complaints for lack of credible evidence, prior to District Court proceedings. 807 F.2d at 306.

Insofar as the proof of a sexual relationship is concerned, neither John Ryan nor Jean Guagenti was called as a witness at trial. The finding by the District Court is based on conjectural evidence of interest and flirtation between the two after Jean Guagenti was hired and during a previous period of employment.*

The testimony of Dr. Harry Dweck, Chief of the Division of Neonatal Perinatal Medicine at New York Medical College and Director of the WCMC Neonatal ICU, highlights the sharp factual issues regarding Petitioners' claimed qualifications and performance of equal work.

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*Evidence that Ryan and Guagenti began living together some months after she was hired and later planned to marry, is not dispositive of whether a relationship existed at time of hire, nor proves the sexual nature of the relationship at that time.

Although Dr. Dweck's testimony was cited favorably by the District Court (Pet. App. B, pp. A24, 25, 26, 28, 33), the District Court's findings are contrary to Dweck's testimony.

Dr. Dweck testified that the Staff Respiratory Therapists were not fully competent to provide services to critically ill newborns; some actually refused to respond to pages from the Neonatal ICU for this stated reason; when they came, they set up respirators, but did not know how to run them for newborns; unlike Petitioners, Jean Guagenti was capable of providing the necessary services to newborns; to reach the necessary degree of competence, weeks of training would be necessary for the Staff Therapists.

Relevant excerpts of Dr. Dweck's testimony are included in Appendix B to this brief (A4-14).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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White Plains, N.Y.
July 1, 1987

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ANTHONY J. DE CINTIO,
PETER A. PIAZZA,
MICHAEL A. GARAYUA,
JOSE P. GOMES,
ANGEL A. GARAYUA,
WINSTON P. DAVID,
DANIEL A. SAMUELS,

DEFENDANTS PRE-TRIAL STATEMENT

Plaintiff,

- against -

WESTCHESTER COUNTY MEDICAL CENTER;
COUNTY OF WESTCHESTER,

Defendants.
----------x

A. STIPULATED FACTS:

1. Annexed is a copy of "Stipulated Facts" submitted to the Court under separate cover.

B. REQUEST FOR FINDINGS OF FACT:

1. The National Board for Respiratory Care ("NBRC") administers two examination systems for respiratory care practitioners; The Certification Examination for Entry

Level Respiratory Therapy Practitioners and the two-part Registry Examination for Respiratory Therapist.

2. The Certification Examination for Entry Level Respiratory Therapy Practitioners is designed to test the knowledge and skills required for all Respiratory Therapy personnel upon entry into the profession.

3. Omitted - not found by District Court.

4. In April, 1982, the "Special Requirement" for the existing title of Assistant Chief Respiratory Therapist (Assistant Chief) was revised to require registration by the National Board of Respiratory Therapy (NBRT)

5. In April, 1982, the title of Assistant Chief, as revised April 1, 1982, was allocated to staff the Perinatal Unit.

6. In April, 1982, none of the Plaintiffs could meet the "Special Requirement".

7. Omitted, not found by District Court.

8. The revision was motivated by two non-discriminatory purposes, i.e., to upgrade the position allocated to staff the Perinatal Unit and, by creating a Registered Respiratory Therapist position, and eventually raise the competency of the entire Respiratory Therapy Department.

9. Omitted, not found by District Court.

APPENDIX B

HARRY DWECK,

called as a witness by the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. MC CARTHY:

Q. Dr. Dweck would what is your speciality?

A. Neonatology, pediatrician.

Q. Are you board certified?

A. Yes in pediatrics and the subspecialty of neonatology by the American Board of Pediatrics.

Q. When did you become affiliated with the Westchester County Medical Center?

A. I believe it was some time around 1979.

Q. Are you employed by the Center?

A. Yes.

Q. Are you also affiliated with the New York Medical School?

A. Yes, I am a faculty member full-time there.

(Joint Appendix in Court of Appeals, page 388a).

. . .

Q. Were you familiar with the respiratory therapists, the staff respiratory therapists on the staff in March, February and March 1982?

A. Yes, several of them.

Q. Had you reached a determination in your opinion as to whether or not any of them were competent to work with neonates at that time?

A. At March of 82, absolutely.

Q. What was your determination?

A. None of them were fully competent in caring for new-borns in any way, shape or form.

Q. With whom did you discuss your opinion?

A. It was on multiple levels but primarily with the administrators of the hospital.

A. Are you familiar with Mr. Armet?

A. Very much so.

Q. Did you express that opinion to Mr. Armet?

A. Very clearly.

(Joint Appendix in Court of Appeals pages 390a to 391a).

. . .

CROSS EXAMINATION:
BY MR. SAPIR:

. . .

Q. You are not familiar with the competency or incompetency of the

plaintiffs in this case, are you?

THE COURT: As of 1982 and 1983.

Q. As of 1982.

A. As of 1982, there were numerous occasions when respiratory therapists who were on call were called to the unit, and either refused to come because they said they didn't know anything about new-borns, and they didn't want to go up to the unit, or they came to the unit and were unable to help us.

Q. Isn't it true that your statement that none of the then staff respiratory therapists were competent was based upon experience you had had with certain staff respiratory therapists?

A. I said were not fully competent, No. 1 and No. 2, yes it was based on my experience preceding the opening of

the unit by approximately a year and a half.

(Joint Appendix in Court of Appeals pages 396a to 397a).

. . .

Q. Hadn't there been services given to infants at the medical center before the opening of the neonatology unit?

A. Yes, for a year and a half.

Q. And hadn't respiratory therapists on staff at the hospital provided services?

A. No, not fully by any means.

Q. Not fully?

A. No.

Q. What do you mean by not fully?

A. They directly would bring up the respirator but would do little more than that. Occasionally they would be

setting up the tubing. The respirators were basically run by myself and the nurses and residents.

THE COURT: When you say run, you mean including setting it up and getting it going?

THE WITNESS: Frequently, yes, and that was true for a good deal of the time during the two shifts. I don't know whether this is volunteering or not, but during the two shifts and the weekends when the single respiratory therapist was not on duty.

Q. But were there occasions when staff respiratory therapists were called in to provide those services?

A. By all means, and sometimes they did provide them.

Q. Did you require that those persons be registered therapists? Do you know that I mean by registered?

A. Yes.

Q. Did you require they be registered?

A. Did I require it? That was not under my purview or authority.

THE COURT: Maybe I can cut it short. It's been represented to the court during the time this trial has been dribbling along that Ms. Guagenti ran this service during the daytime up until the time that you ordered her terminated; and that during the other two shifts, persons who were not registered therapists provided whatever services were required in that particular care unit.

Is that a valid statement of fact?

THE WITNESS: No, it is not. They did not provide whatever services were required. They provided some services, and sometimes they provided little or no service, as for example, the times when they refused to come.

THE COURT: Apart from people who refused to come, or let me put it differently: What if anything apart from refusal to come, which ought to be justification for a discharge, what if anything detemined what services the non-registered therapists provided during the time when Ms. Guagenti was not on duty through 1983 or '82, whenever it was that you terminated her?

THE WITNESS: I think it probably would be of value in order to clarify this if I may, to speak of some of the responsibilities of what a respiratory therapist --

THE COURT: I am more concerned with what occurred during the time when --

THE WITNESS: When Ms. Guagenti was not in the unit.

THE COURT: In the beginning period of this service, what if anything was

done by non-registered people?

THE WITNESS: There are two primary functions the respiratory therapists carried out within the unit. One was to set up hoods wherein supplemental oxygen was given to babies who had respiratory distress and required additional oxygen. That was very easy and almost any one of them could have provided that.

But the second was in those babies who were critically ill and who had respiratory failure and stopped breathing or for some reason or other required artifical ventilation. It was in setting up ventilators and in maintaining ventilators where many of them did not know how the respirator fully functioned.

THE COURT: That went on 24 hours a day.

THE WITNESS: That went on on the 16 hours a day when Ms. Guagenti was not there.

THE COURT: Went on all around the clock?

THE WITNESS: The respirators did, yes.

THE COURT: The need to install or set up a respirator?

THE WITNESS: Went on 24 hours a day yes.

THE COURT: I gather when she was not there?

A. The respiratory therapists either frequently delivered the ventilator and then either they with our help set it up ourselves, meaning my component, the physicians in addition to the nurses.

THE COURT: How many times would someone have to do this with your help in order to be able to do it?

THE WITNESS: Very frequently.

THE COURT: A lot?

THE WITNESS: Yes.

THE COURT: How long does it take to learn how to do it?

THE WITNESS: In terms of setting up the ventilator, I think anybody with average intelligence could probably learn it after two or three times being demonstrated as to how to set it up. As to what to do with it once it's set up and to have it function, that takes weeks, in my estimation.

(Joint Appendix in Court of Appeals pages 398a to 402a).

. . .